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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

No. 80-6506

SON H. FLEMING, Petitioner

v.

SAM AUSTIN, Warden, Respondent.

Reply Brief of Petitioner

THIS IS A CAPITAL CASE

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May 13, 1981

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Introduction

The State of Georgia's brief in this capital case makes several concessions which strongly support petitioner's request for review.

1) The State concedes that petitioner did not fire the fatal shots (p. 9)*/ and that the crucial question presented by the petition is "Did the fact Petitioner did not fire the fatal shot render his death penalty disproportionate." (p. i).**/ This is precisely the question left open by this Court in Lockett v. Ohio, 438 U.S. 586 (1978). It is presented squarely by this petition.

2) The State concedes that petitioner, an illiterate indigent facing the death penalty, did not have a lawyer appointed at his committal hearing. (p. 9). In an effort to show that petitioner was not specifically prejudiced by this constitutionally fatal omission--a legal irrelevancy in capital cases--the State makes the preposterous argument that the man who was eventually appointed to represent him (some three months later), happened to be in the courtroom during the hearing. The record establishes, however, that the subsequently appointed lawyer was present "for a fractional part of the hearing" solely "as a spectator" who "had nothing to do with that hearing." The State concession that petitioner was unrepresented at his hearing, coupled with what the record establishes, requires reversal under the clear holding of Hamilton v. Alabama, 368 U.S. 52 (1961).

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*/ "Henry Willis . . .fired the fatal shots. . ." (p. 9)

**/ As detailed infra at p. 2. the State correctly contends that there was testimony--entirely by the highly suspect cellmate witness--that petitioner may have wounded the deceased. But the jury was instructed that it could convict the defendant without believing that testimony, and it must be assumed--as a matter of law--that the jury did not believe that testimony and convicted petitioner on the basis of accessorial liability as it was invited to do by the trial court. See infra at pp. 2-3.

3) The State concedes that the cellmate-witness who testified against petitioner "was released from custody seven-and-a-half months early" as "a result of" the "recommendation of the District Attorney, and sentencing judge [in petitioner's case]." (p. 11). The State does not deny that this was a reward for his testimony. The most it is willing to state is that "no evidence was presented. . .to reflect that the State made a surreptitious promise of a shortened sentence prior to Petitioner's first trial." (p. 12, emphasis added). This falls far short of an unequivocal denial that a promise, assurance, or expectation was, in fact, given by the State or perceived by the witness. In the face of the fact that the witness took off and disappeared as soon as he was freed, the State's concessions that he did receive a shortened sentence at the recommendation of the D.A. and trial judge immediately after his testimony, raises the unmistakable inference that the events were not unrelated and the reward was not unexpected.

A. Petitioner was sentenced to death without any finding that he participated in the actual killing or intended the death of the victim.

In his opening brief, petitioner argued that the judge's instructions to the jury permitted them to convict petitioner of murder and sentence him to death without ever having to find that petitioner participated in the actual killing or intended the death of the victim. (Pet.'s opening brief 11-12). The government has chosen to ignore this argument and instead responded that the evidence was conflicting as to whether petitioner had shot the victim and that the conflict must be resolved in favor of the prosecution. (State's reply brief, p. 7).

Petitioner agrees that the evidence was in conflict and so stated in the opening brief. (Pet.'s opening brief, p. 8).*/

*/ However, the only evidence that petitioner participated in the shooting was the highly suspect testimony of Ira Bass. See petitioner's opening brief, at 8, 24-26.

However, petitioner is not asking this Court to resolve an evidentiary question. The point is rather that neither the judge nor the jury was required to resolve the issue before sentencing petitioner to death; and that the record of this case provides absolutely no information on how they would have resolved it, had they been required to do so. Under the judge's instructions, the jury was permitted to convict petitioner of murder under a theory of accessorial liability, and was then permitted to sentence him to death if they found that the victim was a police officer. (Pet.'s opening brief at 11-12). The State cannot properly ask this Court to affirm petitioner's death sentence on the assumption that the jury believed the testimony of Ira Bass--which was the only evidence that petitioner fired at the deceased. The far more likely assumption is that the jury disbelieved or ignored that highly suspect testimony and based its verdict on the trial court's invitation to convict on an accessorial liability theory. In any event, the law is clear that since the jury was permitted to sentence petitioner to death without ever finding that he participated in the killing or intended death, and in fact never made a finding as to either issue, the constitutionality of petitioner's sentence must be reviewed on the assumption that petitioner was never found to have participated in the killing or intended death. Bachellar v. Maryland, 397 U.S. 564, 569-571 (1970). This case thus raises squarely the issue left open in Lockett v. Ohio, 438 U.S. 586 (1978) as to whether petitioner's death sentence violates the Eighth Amendment. (See Pet.'s opening brief, pp. 13-14).

B. The Trial Court's minimal instructions on mitigating circumstances were constitutionally deficient.

Petitioner's opening brief argued that the jury was effectively precluded from considering mitigating circumstances

proffered by the defendant, in violation of the principles of Lockett v. Ohio, supra, because the judge devoted considerable discussion to aggravating circumstances presented by the State, devoted only two sentences to mitigating circumstances, and never mentioned the mitigating circumstances presented by the defense. (Pet.'s opening brief, at 14-16). The State's short response paraphrases what the judge said and implies that because the judge did not forbid the jury to consider mitigating circumstances, the principles of Lockett were satisfied. (State's brief at 7-8).*/

Surely the State would not argue that the dictates of Lockett would have been satisfied if the judge had made no mention of mitigating circumstances. Even under Georgia law, ". . .the jury must consider the mitigating and aggravating circumstances relevant to the defendant," Fleming v. State, 241 Ga. 42, 240 S.E. 2d 37, 41. Gregg v. Georgia, 428 U.S. 153, 192 (1976) clearly contemplates that the "jury should be given guidance in its decisionmaking."

The fact that the judge gave minimal instructions as to mitigating circumstances does not satisfy the constitutional imperatives of Lockett. As was pointed out in petitioner's brief, even these minimal instructions were overshadowed by the judge's extensive discussion of aggravating circumstances, thus implying to the jury that the judge considered mitigating evidence to be relatively unimportant. (Pet.'s opening brief at 16). This resulted in the effective preclusion of the jury's guided consideration of mitigating circumstances, a point to which the State has failed to respond.

*/ The State also erroneously contends that defense counsel did not object to the charge. (State's brief at 8.) In fact, objection was made and was overruled. (Petitioner's opening brief at 10).

C. The arbitrary imposition of the death penalty on petitioner violates the principles of Godfrey v. Georgia.

Godfrey v. Georgia, 100 S.Ct. 1759 (1980), reaffirmed the principles that the State must apply its capital punishment laws so as to avoid the arbitrary infliction of death and provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Id. at 1764, quoting from Gregg v. Georgia, 428 U.S. 153, 188 (1976). The government does not dispute the fact that although petitioner, Larry Fleming, and Henry Willis were all convicted of the same crime, the jury in petitioner's case was charged as to an aggravating circumstance not charged in Larry Fleming's and Willis's cases, and the juries in the latter two cases were charged as to two aggravating circumstances not charged in petitioner's case.*/ Furthermore, the jury in Larry Fleming's case found the existence of two out of three statutory aggravating circumstances and sentenced him to life imprisonment, whereas the jury in Henry Willis' found the existence of all three and sentenced him to death. This arbitrary use of aggravating factors by the government, and its seemingly chance results, violate Godfrey, and cannot be made constitutionally acceptable by the State's assertion that ". . .the jury had its discretion guided concerning imposition of the death penalty," (State's brief at 9). Discretion guided by a roulette wheel does not meet the stringent requirements necessary when a decision is to be made between life and death.

The State attempts to justify petitioner's death sentence in comparison with Larry Fleming's life sentence for the same crime by claiming that there was no evidence that Larry Fleming

*/ The aggravating circumstances charged in the various cases related to the circumstances of the crime itself, and not to the individual circumstances of the defendants, such as prior felony records. There is thus no apparent reason why the juries were charged as to different aggravating circumstances.

shot the victim, while there was evidence that petitioner did.*/ First of all, the only evidence introduced by the State that linked petitioner to the shooting was Ira Bass's suspect testimony. More importantly, however, neither of petitioner's juries was required to base its decision on this point. (See supra at A). Petitioner's jury might have found him less culpable than Larry Fleming's did him, yet Georgia law allowed either jury to sentence either man to death on the basis of arbitrarily presented statutory aggravating circumstances,and without having to find that the one sentenced to die was more culpable than the one granted life. It is this capricious procedure, with results that provide no "meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not," that violates Georgia's constitutional duty, and petitioner's constitutional right.

D. The Lack of counsel at Petitioner's committal hearing requires reversal.

The State admits that petitioner was not represented by counsel at his committal hearing. (State's brief at 9.) Therefore, under Hamilton v. Alabama, 368 U.S. 52 (1961), petitioner's conviction must be overturned.

The State tries to mitigate this evidence of clear constitutional error by stating that petitioner's eventual trial counsel, Mr. Parrish, who was appointed several months after the hearing,

*/ Here, as on pages 5 and 6, the State attempts to make use of testimony allegedly given by Henry Willis at Willis' trial. This testimony was not presented at either petitioner's first trial nor his second, since Willis' trial took place after both of petitioner's trials. Furthermore, Willis did not testify at either of petitioner's trials, and petitioner's counsel has never had the opportunity to cross-examine Willis. The State's attempt to introduce new evidence at this stage of the proceedings, and particularly testimony that petitioner has never been afforded the opportunity to test by cross-examination, is comparable to appending newspaper editorials to its brief. The State's action is highly improper and unfair and references to testimony at Willis' trial should be disregarded by this Court.

was present at the hearing. (State's brief at 9, 10). However, Mr. Parrish made it clear, on the very transcript page referenced by the State, that he was not acting as petitioner's counsel at the time and only saw "a fractional part of the hearing." (Tr. 1 at 333). "I did not sit with counsel. I sat down as a spectator, which I was. And I had nothing to do with that hearing, nor did I receive copies of any confessions or admissions." Surely the chance presence of Mr. Parrish at part of the hearing cannot be deemed to have given petitioner the effective assistance of counsel to which he was constitutionally entitled at this admittedly crucial stage of the prosecution. See State v. Houston, 234 Ga. 721 (1976) (Georgia's preliminary committal hearing is a criticial stage of the prosecution, at which counsel must be appointed for an indigent defendant.) Whatever it was Mr. Parrish was doing during the "fractional part" of the hearing that he saw, he was not providing the effective assistance of counsel. The fractional presence of a spectator at a preliminary hearing cannot magically be transformed into the effective assistance of counsel by a subsequent appointment of that spectator as the defendant's trial lawyer.

E. The testimony of the State's cellmate witness raises serious constitutional issues.

The only evidence that petitioner personally participated in the actual shooting was a "confession" allegedly made by the petitioner to a white inmate (Ira Bass) the petitioner had never previously met. Petitioner contends that use of this testimony 1) violated his right to counsel when questioned by a government informant, U.S. v. Henry, 100 S.Ct. 2183 (1980), and 2) precluded a fair trial because the State did not disclose the arrangements made with Bass in return for his cooperation. Giglio v. United States, 405 U.S. 150 (1970). The reply brief's discussion of the Bass testimony errs in three important respects.

First, the State argues that petitioner's right to counsel "did not attach" because the alleged conversations occurred several months prior to appointment of counsel and indictment. The fact that the State erred by not appointing counsel until six months after petitioner was arrested and placed in custody can surely not serve to excuse the improper procedure by which the alleged statements were secured. At the time the statements were allegedly obtained, the indigent petitioner had been in police custody, and under arrest, for 36 hours before his transfer to the prison where the alleged conversations took place. The State's unexplained delay in providing counsel for six months following petitioner's arrest should not now be held against him on the issue of the surreptitious government investigation.

Second, the State mis-reads the record on the timing of petitioner's alleged disclosures to Bass. Bass's testimony on the alleged disclosures is clear--there was no confessional "statement", as the reply brief suggests (pp. 10, 11), but instead, a series of conversations over several days (Tr. 1, p. 468-69.) Bass's testimony at trial was that he contacted, and met with, prison officials on Saturday, February 14 (Tr.1, p. 470), only one day after petitioner was committed to the Cook County jail (Tr.2, p. 297). The next day, February 15, Bass met with the police and district attorney investigating the case (Tr.2, p.315). Once the notion of a confessional "statement" is discarded, the record establishes that most of the alleged conversations occurred after the meeting with prison officials, after the meeting with the police and district attorney, and while Bass was acting as a de facto government agent and informant.

Finally, the reply brief errs in claiming that "no evidence" exists (page 11) to support petitioner's claim that the government arranged an early release for Bass in return for cooperation at petitioner's trial. As the State now admits (for the first time), Bass's discharge--within 10 days after petitioner's first trial--was seven and one-half months early. The trial record establishes that the circumstances surrounding Bass's release were highly unusual (see petitioner's opening brief, page 25a). Petitioner had no opportunity to question Bass on

the terms of his release, because the State was unable to secure his presence as a witness for the second sentencing trial. Given this questionable discharge, the State surely has an obligation to make a forthright statement on the arrangements made with Bass, rather than to fault petitioner for an alleged failure to produce evidence of a deal from a missing government witness.*/

Conclusion

Petitioner vigorously asserts his total innocence of the crime for which he stands sentenced to die. His trial was a travesty. His legal representation was a mockery and a sham. If this petition is denied, he will be left on death row without an attorney. The spectre of an innocent, illiterate, black American facing death alone--without counsel--for a crime he did not commit after a trial at which he was not defended is difficult to imagine. Yet it will happen, because there are--to counsel's knowledge--no provisions for the appointment of counsel once the petitioner has exhausted his state remedies. Russ v. Moffitt 417 U.S. 600, 617 (1974).**/ This case is ripe for review and resolution by this Court now. Petitioner respectfully urges

*/ There is one important factual error in the State's brief that requires correction. On page 3, the government stated that "Petitioner told West that he had gotten wet and needed dry clothes. . ." (T. 235) Actually, West testified "He did mention about he needed some clothes. Said water got on him or something about water." (Id.) Later, West testified on cross-examination:

A: He [petitioner] didn't tell me about nobody got their clothes wet. He asked for the clothes.
Q: But, he asked for some clothes and his clothes was dry?
A: His clothes was dry but he asked for the clothes." [Tr. 1 at 240-41.]

**/ Counsel on this petition is a volunteer, out-of-state attorney who cannot continue to represent petitioner before the federal courts of Georgia. This case has already taken hundreds of hours of his time and has cost him many hundreds of dollars from his own pocket. Yet in the absence of volunteer counsel, this petition would have had to be sumitted pro se by an illiterate capital defendant. If this petition is denied, all subsequent petitions may have to be submitted by petitioner pro se, unless counsel is appointed or unless volunteer counsel is again secured.

this Court to grant the petition.

Respectfully submitted,

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